# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 15, 2008 |
| v | No. 274291<br>Oakland Circuit Court |
| ERWIN CHRISTOPHER THOMAS,<br><br>Defendant-Appellant. | LC No. 2005-202734-FH |

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 450 or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(*ii*), and possession with intent to deliver 50 or more but less than 450 grams of heroin, MCL 333.7401(2)(a)(*iii*). Defendant was sentenced to 20 to 50 years' imprisonment for the former offense and to 15 to 30 years' imprisonment for the latter offense. We affirm.

Police officers arrested defendant following an investigation regarding suspected drug activity. At the time of his arrest, police officers recovered 49.9 grams of heroin from his pocket and an additional 3.8 grams of heroin from Willie Jones, a passenger in defendant's vehicle driven immediately before his arrest. In a statement to the police, defendant admitted giving the 3.8 grams of heroin to Jones and that he intended to deliver heroin to a person at a Mr. Alan's shoe store when he was arrested outside the store. Following defendant's arrest, police officers executed a search warrant at 45 Sallee in Pontiac and recovered nearly 500 grams of cocaine in a box in the basement. Defendant admitted that the cocaine belonged to him.

Defendant first argues that the trial court denied him a fair trial by telling a juror that he "had been taken" out of the courtroom. He contends that the trial court's statement improperly informed the juror that he was in custody. We disagree.

The Fourteenth Amendment guarantees a criminal defendant the right to a fair trial, and the presumption of innocence is an important component of a fair trial. *People v Banks*, 249 Mich App 247, 258; 642 NW2d 351 (2002), citing *Estelle v Williams*, 425 US 501, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976). This Court has recognized that shackling or physically restraining a defendant during trial or requiring him to wear prison attire may impair his presumption of innocence by identifying him as a prisoner. See *People v Harris*, 201 Mich App 147, 151-152; 505 NW2d 889 (1993); *People v Williams*, 173 Mich App 312, 314-315; 433 NW2d 356 (1988).

However, to warrant reversal a defendant must establish prejudice. *Harris*, *supra* at 152; *Williams*, *supra* at 315.

Here, the trial court's inquiry whether the juror saw defendant "being taken down the hallway" did not necessarily inform the juror that defendant was in custody. Moreover, the juror indicated that he did not see defendant, but rather, was asking personnel at the clerk's office a question. Accordingly, defendant has not established prejudice, and the trial court's inquiry of the juror did not deny defendant a fair trial.

Defendant next argues that he was denied the effective assistance of counsel when defense counsel admitted during his opening statement that defendant committed the charged offenses. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Matuszak*, *supra* at 48, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, *supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant was charged with possession with intent to deliver 450 or more but less than 1,000 grams of cocaine and possession with intent to deliver 50 or more but less than 450 grams of heroin. The heroin involved in this case weighed slightly over 50 grams and was divided into three packages, one recovered from defendant's pocket, one from Jones's shoe, and the other from Jones's sweatshirt pocket. The heroin recovered from defendant's pocket weighed 49.9 grams, and the heroin found on Jones's person collectively weighed 3.8 grams. Defense counsel's trial strategy was to concede that defendant possessed and intended to deliver less than 50 grams of heroin, or the amount found in defendant's pocket, but that he did not possess the heroin recovered from Jones or commit either of the charged offenses. Thus, the record does not support defendant's contention that counsel conceded guilt on the two charged offenses and made no attempt to defend him.

This Court has recognized that admitting guilt on lesser offenses and contesting guilt on greater offenses can constitute sound trial strategy. *Matuszak*, *supra* at 60; *People v Emerson (After Remand)*, 203 Mich App 345; 349; 512 NW2d 3 (1994). In fact, in *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984), this Court stated that "arguing that the defendant is merely guilty of the lesser offense is not ineffective assistance of counsel." This Court also observed that "[w]here defense counsel in opening statement recognizes and candidly asserts the inevitable, he is often serving his client's interests best by bringing out the information and thus lessening the impact." *Id.*

Because defendant had in his possession at the time of his arrest less than 50 grams of heroin that he admitted he intended to sell, counsel chose to concede guilt regarding that amount and substance only. Possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), is a Class D felony, while possession with intent to deliver 50 or more but less than 450 grams of heroin is a Class B felony. MCL 777.13m. Therefore, defendant's conviction of the lesser offense instead of the greater offense would have subjected him to a much shorter sentence. See MCL 777.63; MCL 777.65. Accordingly, defendant has failed to overcome the presumption that counsel's concession of guilt to the lesser offense constituted sound trial strategy. *Toma, supra* at 302.

Defendant next contends that the trial court's denial of his request for a hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), denied him his rights to a fair trial and to be free from unreasonable searches and seizures. We disagree. A trial court's denial of a *Franks* hearing is reviewed under the same standard as that pertaining to a motion to suppress. We review a trial court's factual findings for clear error and its conclusions of law de novo. *United States v Graham*, 275 F3d 490, 505 (CA 6, 2001).

An affidavit supporting a search warrant is presumed to be valid. *Franks, supra* at 171. However, if false statements are made in an affidavit and the false information was necessary to a finding of probable cause, the evidence obtained pursuant to the warrant must be suppressed. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). "In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause." *Id.* at 224. In order to mandate an evidentiary hearing, a defendant's challenge must be more than conclusory and be supported by more than a mere desire to cross-examine the affiant. *Franks, supra* at 171-172. A defendant must specifically identify the portion of the affidavit alleged to be false and support his allegations with an offer of proof. *Id.* at 171. "[W]here the affidavit includes sufficient untainted information to establish probable cause apart from the misinformation, the affidavit, and resulting search warrant, remain valid within the scope and to the extent of the untainted information." *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007).

The trial court properly denied defendant's request for a *Franks* hearing. The affidavit in support of the search warrant alleged that police officers conducted surveillance of defendant on each day from October 29, 2004, through November 17, 2004, and observed him in Detroit and in the metropolitan Detroit area. Defendant presented an affidavit of Judith A. Gorham, a senior paralegal of Delta Air Lines, Inc., stating that the airline's records indicated that defendant flew to Atlanta on November 3, 2004, and returned to Detroit on November 8, 2004. Defendant thus argued that the search warrant affidavit falsely indicated that he was under surveillance during that time.

The trial court properly determined that Gorham's affidavit established only that defendant had purchased a plane ticket rather than that he actually left town from November 3 to November 8, 2004. Moreover, the trial court determined that the allegedly false statements were not necessary to a finding of probable cause because there were sufficient additional allegations

that did not reference that time period to establish that the items sought would be recovered at 45 Sallee. Our review of the search warrant affidavit confirms that it contains sufficient allegations of narcotics activity to support a finding of probable cause notwithstanding the time period during which defendant was purportedly out of town. Therefore, the search warrant was valid, and defendant was not entitled to a *Franks* hearing. *Griffin, supra* at 42.

Defendant next argues that the trial court erred by excluding evidence that Detective Cory Bauman, the search warrant affiant, lied in the warrant affidavit. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The trial court did not abuse its discretion by excluding evidence of Detective Bauman's alleged perjury regarding the search warrant affidavit. Even if the allegations in the affidavit were relevant to Bauman's credibility, as previously discussed, the fact that defendant may have purchased a plane ticket did not necessarily mean that he was out of town from November 3 through November 8, 2004. Therefore, the allegations in the affidavit stating that police officers observed defendant on those days were not necessarily false. Moreover, Bauman testified that he relied on the representations of other police officers who conducted surveillance of defendant and did not work "24 hours a day, 7 days a week." Thus, allegations based on information obtained from other officers, even if false, would not be probative of Bauman's credibility, considering that Bauman did not testify that he personally observed defendant from November 3 through November 8, 2004. Accordingly, the trial court did not abuse its discretion by excluding the evidence.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Patrick M. Meter